IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No. 180 of 1995

For Approval and Signature:

HONOURABLE MR.JUSTICE J.M.PANCHAL

HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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COMMISSIONER OF INCOME TAX - Applicant
Versus
SWASTIK SANITARY WORKS LTD. - Respondent

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Appearance :
MR MANISH R BHATT for Applicant
SERVED BY RPAD - (N) for Respondent.

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CORAM : HONOURABLE MR.JUSTICE J.M.PANCHAL
and
HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

Date : 27/04/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE J.M.PANCHAL)

The Income Tax Appellate Tribunal, Ahmedabad Bench “A” has referred following two questions for the opinion of this Court under Section 256(1) of the Income-tax Act, 1961 :-

(1) Whether, the Appellate Tribunal is right in law and on facts in directing the I.T.O. To allow to carry forward business loss, though time was not extended by the I.T.O. for filing of return ?

(2) Whether, the Appellate Tribunal is right in law and on facts in directing the I.T.O. to allow depreciation and investment allowance on the costs of the assets without deducting the amount of subsidy ?

2. For Assessment Year 1985-86, the assessee-Company filed the return on September 30, 1985 showing loss of Rs. 64,91,746/-. The Assessing Officer completed assessment on February 11, 1988, wherein he computed business loss at Rs. 31,95,090/- and unabsorbed depreciation at Rs.29,52,801/-. The Assessing Officer allowed unabsorbed depreciation to be carried forward,

but, with regard to the business loss, he noted that the assessee had applied for extension of time in Form No.6 for filing the return on June 26, 1985 requesting to grant time upto September 30, 1985 to file the return, but, the assessee had not received any reply from the Assessing Officer and, therefore, the assessee was not entitled to the benefit of carrying forward the business loss. In appeal, Commissioner of Income-Tax (Appeals) noticed the principles laid down in cases of (i) Commissioner of Income-Tax, Gujarat-IV v. Gordhanbhai Jethabhai, 142 I.T.R. 84, and (ii) Lachman Chaturbhuj Java v. R.G.Nitsure and Ors. 132 I.T.R. 631, and held that as the assessee had filed Form No.6 seeking extension of time to file return, it was the duty of I.T.O. to dispose of the same, and as the department had chosen not to reply to the assessee's application within the time, the assessee was justified in proceeding on the footing that the time prayed for was extended by the department. In view of the said conclusion, C.I.T.(A) directed that the business loss be allowed to be carried forward. In appeal by the Income-tax Officer, Ahmedabad, the Tribunal has confirmed the view taken by C.I.T.(A), which has given rise to the instant Reference.

3. This Court has heard Ms. Monaben M.Bhatt, learned counsel for the department, at length and in great detail, and also considered the facts of the case. It may be stated that though the assessee is duly served, it has neither appeared through its constituted agent,nor through a lawyer.

4. In so far as Question No.1 is concerned, it is not in dispute that the assessee had submitted Form No.6 on June 26, 1985 and had sought time upto September 30, 1985 to enable him to file the return. It is also not in dispute that return of income was filed by the assessee on September 30, 1985 and the assessee had not received till the said date any reply from the Assessing Officer informing the assessee as to whether the request made by the assessee in Form No.6 was accepted or rejected. In Commissioner of Income-Tax, Gujarat-IV (Supra), the Division Bench of this Court has held that when an application for extension of time for furnishing return is not disposed of by the Income-tax Officer, the assessee would be justified in entertaining a reasonable belief that his application is granted by the I.T.O. The Division Bench has further held that if under such belief an assessee does not furnish the return in time, it can

not be said that there was no reasonable cause for not furnishing return in time. Thus, from the principle laid down by this Court, it is evident that when an application seeking extension of time to file the return, is not disposed of, the assessee would be justified in entertaining a reasonable belief that his application is granted. In a tax proceeding and more so, where penalty is attracted, it is not only right and proper, but pre-eminently essential and imperative that the department should intimate to the assessee its refusal to extend time without expecting the assessee to dance attendance on the department by making inquiry whether the department proposes to grant assessee's application or not. If the department does not desire to grant the assessee's application for extension of time, it is the duty of the department to inform the assessee accordingly, well in advance, so that the assessee is put on his guard that unless he files his return within the prescribed period, penal consequences are liable to follow. If the department chooses not to reply to the assessee's application within the time applied for by the assessee, time is deemed to be extended as prayed for by the assessee, and he would be justified in assuming that his application has been granted by the department. Under

the circumstances, this Court is of the opinion that the Appellate Tribunal was right in law and on facts in directing the Income-tax Officer to allow to carry forward business loss though intimation regarding extension of time to file the return was not given to the assessee. The said question, therefore, will have to be answered in the affirmative i.e. in favour of the assesee and against the Revenue.

5. In so far as Question No.2 is concerned, this Court finds that the same is squarely covered by decision of the Supreme Court in Commissioner of Income-Tax v. P.J.Chemicals Ltd., 210 I.T.R. 830. In the said case, after review in law on the point, the Supreme Court has held as under :-

> “Where Government subsidy is intended as an incentive to encourage entrepreneurs to move to backward areas and establish industries, the specified percentage of the fixed capital cost, which is the basis for determining the subsidy, being only a measure adopted under the scheme to quantify the financial aid, is not a payment, directly or indirectly, to met any portion of the “actual cost”. The expression “actual cots” in section 43(1) of the Income-tax Act, 1961, needs to be interpreted liberally. Such a subsidy does not partake of the incidents which attract the

conditions for its deductibility form “actual cost”. The amount of subsidy is not to be deducted from the actual loss under Section 43(1) for the purpose of calculation of depreciation etc.”

6. In view of the principle laid down by the Supreme Court in the decision quoted above, this Court is of the opinion that the Appellate Tribunal was right in law and on facts in directing the Income-Tax Officer to allow depreciation and investment allowance on the cost of the assets without deducting the amount of subsidy. Therefore, the second question referred to this Court for opinion will have to be answered in the affirmative i.e. in favour of the assessee and against the Revenue.

Accordingly, both the questions referred to this Court for opinion, are answered in the affirmative i.e. against the Revenue and in favour of the assessee. The Reference accordingly, stands disposed of. There shall be no order as to costs.

[J.M.PANCHAL,J.]

[BANKIM.N.MEHTA,J.]

(patel)